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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

ASSOCIATED DRY GOODS CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENT

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BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENT

The Equal Employment Advisory Council (EEAC), with the written consent of all parties, respectfully submits this brief as Amicus Curiae in support of the Respondent.[1]

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad

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[1] Their consents have been filed with the Clerk of the Court.

segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially, all of EEAC's members, or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*). As such, EEAC's members have a direct interest in the issue presented for the Court's consideration; that is, whether Sections 706(b) and 709 (e) of Title VII prohibit the Equal Employment Opportunity Commission (the Commission or EEOC) from disclosing information obtained during its investigation of a charge to charging parties, their attorneys or other persons outside the government prior to the institution of a court suit.[2]

STATEMENT OF THE CASE

Several employees of Joseph Horne Company, a subsidiary of Associated Dry Goods Corporation (Associated), filed charges alleging race and sex discrimination between 1971 and 1973. The Commission's investiga-

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[2] Because of its interest in issues involving the disclosure of business information, EEAC filed a brief as Amicus Curiae in this Court in *Chrysler Corp.* v. *Brown*, 99 Sup. Ct. 1705 (1979); the District of Columbia Circuit in *Sears, Roebuck & Co.* v. *EEOC*, 581 F.2d 941 (D.C. Cir. 1978); and the court below. EEAC also has filed amicus curiae briefs in other equal employment cases before the Court. *See, e.g., International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977); and *Great American Federal Savings & Loan Association* v. *Novotny*, 99 Sup. Ct. 2345 (1979).

tion of those charges included serving wide-ranging interrogatories on Horne (Jt. App. 19-21) seeking information about its employment practices, including confidential business information. Horne sought assurances from the EEOC that its answers would not be disclosed to the charging parties, their attorneys, or others. Adhering to its disclosure rules, 29 C.F.R. §§ 1601.22 and 1610.17(d), and special disclosure rules found in Section 83 of its Compliance Manual,[3] the EEOC refused to give such assurances. As found by the district court, the EEOC "explained that its policy was to disclose to charging parties both their own case files (including data submitted by the employer in response to Commission interrogatories) and 'related case files'—files involving the same employer which were compiled during the investigation of similar charges filed by other individuals." Pet. App. 17a. Consequently, Horne refused to answer the interrogatories and the Commission thereafter subpoenaed the data sought in them. Subsequently, Associated brought suit in district court challenging the EEOC's disclosure regulations and seeking injunctive relief. Agreeing with the District of Columbia Circuit's reasoning in *Sears, Roebuck & Co.* v. *EEOC*, 581 F.2d 941 (D.C. Cir. 1978), the district court ruled that the EEOC's disclosure regulations were invalid and unenforceable to the extent that they authorize disclosure to charging parties, their attorneys or others outside of government prior to the institution of a court suit under Title VII. The Fourth Circuit affirmed the ruling and rationale of the district court.

The EEOC petitioned for and this Court granted *certiorari* on the issue of whether information obtained during investigation of a charge may be disclosed to the parties immediately involved in the charge. Amicus agrees with the Respondent that, in phrasing the dis-

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[3] The texts of these rules are found in Petitioner's Brief for Certiorari 3-4 and Appendix E, 33a-44a.

closure issue, the government has improperly narrowed the issue before this Court to the facts of this particular case, because in the courts below the Commission sought to uphold its disclosure regulations in their entirety. See Respondent's Brief in Opposition to Certiorari 5-7. Rather, we believe the issue is as phrased in our statement of interest (see p. 2, *supra*) and in Associated's Opposition to Certiorari and Brief.

SUMMARY OF ARGUMENT

The statutory language and legislative history of Section 709(e) of Title VII support the conclusion of the court below and the District of Columbia and Seventh Circuits that Section 709(e) precludes pre-suit disclosure by the EEOC of information from its investigative files to members of the public, including charging parties, their attorneys and others outside of government. Pet. App. 1a-7a; *Sears, Roebuck & Co.* v. *EEOC*, 581 F.2d 941 (D.C. Cir. 1978); and *Burlington Northern, Inc.* v. *EEOC*, 582 F.2d 1097 (7th Cir. 1978). The government's attempted distinction between disclosing investigative information to charging parties and their attorneys and "making public" such information is illusory because: (1) the Commission itself treats charging parties as members of the public under the Freedom of Information Act; (2) a charging party is a member of the public with respect to discrimination charges filed by others; and (3) the EEOC has no effective way of precluding a charging party from disseminating information to the public once it is received.

As both the *Sears* and *Burlington* decisions recognize, to permit disclosure of information from the Commission's investigative files to charging parties would "encourage the filing of private lawsuits" in derogation of the Commission's role as the principal enforcer of Title VII rights and "undercut the preferred enforcement scheme of comprehensive negotiation and settlement" through the Commission's offices. 582 F.2d at 1100.

Accord, Sears, 581 F.2d at 946. The only court of appeals holding to the contrary—the Fifth Circuit's decision in *H. Kessler & Company* v. *EEOC*, 472 F.2d 1147 (1973) (en banc), *cert. denied*, 412 U.S. 939 (1973)—was specifically considered and rejected by both the District of Columbia and Seventh Circuits, in part because it took no account of these problems inherent in the Commission's disclosure policy. The government now urges this Court to adopt the discredited *Kessler* rationale, but offers no satisfactory answers to the problems pointed out by other circuits in *Sears* and *Burlington*. The fact remains that voluntary cooperation and conciliation will be severely undermined if information obtained by the Commission can be disclosed freely to persons or organizations who may then institute their own Title VII suits against the employer that supplied it.

By granting charging parties access to investigative file materials, the Commission's regulations grant them unwarranted discovery rights not justified by the plain meaning of Section 709(e). In doing so, these regulations preclude employers from obtaining protective orders limiting the scope of discovery under the Federal Rules of Civil Procedure Rule 26(c). The importance of this procedural protection cannot be minimized, because responses to Commission interrogatories, alone and in conjunction with EEO-1 reports, contain confidential business information whose disclosure could result in severe competitive harm in many instances. Furthermore, because neither Section 709(e) nor the Commission's disclosure regulations constitutes "authori[zation] by law" for the disclosure of confidential commercial information, the Commission's disclosure policies violate the Trade Secrets Act.

ARGUMENT

I. THE EEOC'S DISCLOSURE REGULATIONS ARE IN CONFLICT WITH THE PUBLIC DISCLOSURE AND SETTLEMENT POLICIES OF TITLE VII

A. Section 709(e) of Title VII Precludes Disclosure of Information to Charging Parties Prior To Their Instituting a Court Suit

Section 709(e) of Title VII states without qualification regarding the disclosure of information obtained during the investigation of a charge of discrimination:

> It shall be unlawful for any officer or employee of the Commission *to make public in any manner whatever* information obtained by the Commission pursuant to its [investigative and recordkeeping] authority under this section prior to the *institution of any proceeding* under this title involving such information. 42 U.S.C. § 2000e-8(e) (emphasis added).

As recognized by the court below, the wording chosen by Congress in enacting Section 709(e) could hardly have made more explicit Congress's intent to prohibit all prelitigation disclosure of materials obtained by the Commission in investigating charges under Title VII. See Pet. App. 7a; *Sears*, 581 F.2d at 948-49; and *Burlington*, 582 F.2d at 1100. The prohibition is stated unequivocally, without ambiguity or reservation. Such information is not to be made public to anyone outside government "in any matter whatever".

Because the language of Section 709(e) is unambiguous and broadly encompassing, it is unnecessary to search for its meaning beyond the words themselves. Congress intended the ban on disclosure to be applied literally to prevent the EEOC from turning over any materials from its investigative files to anyone outside the government prior to conciliation and litigation. Most significantly, as the District of Columbia Circuit recognized, Congress enacted Section 709(e) in the context

of a well-established practice throughout the government of forbidding disclosure of investigatory materials even to private litigants. *Sears*, 581 F.2d at 947. As that court noted, the policy uniformly followed by agencies such as the National Labor Relations Board and Department of Justice had been to refuse to provide private parties with such information except when faced with "some express statutory authorization or requirement to do so." *Id.*[4] Since Congress, in the context of this prevailing policy, chose to include no express disclosure authorization in Title VII, but rather to include the sweeping ban on disclosure set forth in Section 709 (e), it cannot be assumed that Congress intended the EEOC to follow a more liberal disclosure policy than these other agencies.

The Commission, nevertheless, seeks to justify its departure from the literal requirements of Section 709(e)

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[4] *See NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978). The Commission itself recognizes the correctness of this principle as is reflected in its recent amendment to its Freedom of Information Act regulations (29 C.F.R. § 1610.17(f)) relating to the disclosure of investigatory records under the Equal Pay and Age Discrimination in Employment (ADEA) Acts:

> (f) Requests for information relating to open case files covering alleged violations of the Equal Pay Act (29 U.S.C. 206(b)) or the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 *et seq.*) will ordinarily be denied under the seventh exemption of the Freedom of Information Act as investigatory records compiled for law enforcement purposes. 45 Fed. Reg. at 40605 (June 16, 1980).

Unlike Title VII, the Equal Pay Act and the ADEA do not have specific prohibitions against disclosure of investigatory data, yet EEOC refuses to turn over such materials to the public or charging parties. EEOC's policy of disclosure in this case, therefore, is in direct contradiction to its position with respect to these other statutes.

by relying heavily on a single passage from the legislative record in which Senator Humphrey comments on Sections 706(b)[5] and 709(e):

> *Fourteenth.* Provisions preserving the confidentiality of Commission procedure have been added to Sections [706(b)] and 709(e). Section [706(b)] provides that a charge filed with the Commission shall not be made public and provides a criminal penalty for a Commission employee who violates this rule. Section 709(e) prohibits the Commission and its employees from making public information obtained by compulsory process in the course of its investigation *except in the course of litigation* arising under the title.
>
> It should be noted that this is a ban on publicizing and not on such disclosure *as is necessary to carrying out of the Commission's duties* under the statute. Obviously, the proper conduct of an investigation would ordinarily require that the witnesses be informed that a charge had been filed and often that certain evidence had been received. Such disclosure would be proper. The amendment is not intended to hamper Commission investigations or proper cooperation with other State and Federal agencies, but rather is aimed at the making available to the general public of unproven charges. 110 Cong. Rec. 12723 (1964) (emphasis added).

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[5] In addition to mandating EEOC conciliation efforts following a "reasonable cause" finding, Section 706(b) provides in relevant part that:

> Nothing said or done during and as part of such informal [methods of conference, conciliation, and persuasion] may be made public by the Commission, its officers, or employees, or used as evidence in a subsequent proceeding without the written consent of the person concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. 42 U.S.C. § 2000e-5(b).

This solitary remark, however, falls far short of justifying the Commission's policy of unrestricted disclosure of investigative file materials to charging parties. Senator Humphrey's specific concern was only that the absolute ban on publicizing not affect disclosure *necessary to carry out the EEOC's duties*, giving as examples very limited forms of disclosure—informing witnesses that "a charge had been filed . . . [or] that certain evidence had been received." *Id.* Such notification, he observed, would have to be made so as not "to hamper Commission investigations." [6] Significantly, there is no indication in Senator Humphrey's statement that disclosure of the substance of evidence obtained by the Commission during the course of its investigation would be necessary or proper. Thus, his comments, viewed in context are fully consistent with the overall Congressional intent that "investigation and conciliation [be] carried out in privacy." 110 Cong. Rec. 8193 (1964) (remarks of Senator Dirksen).

The limited disclosure foreseen as necessary by Senator Humphrey hardly authorizes EEOC's broad disclosure provisions. The effective and efficient conduct of an investigation does not require the complete or partial disclosure of documents. It strains credulity to believe that an investigation or a realistic view of the facts by the parties during conciliation requires more than indirect disclosure of the substance of documents. It therefore seems inconceivable that the present investigations of the Commission, including its fact finding conferences, are not already being performed in accordance with the

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[6] Service of a charge is now mandated by the Act (Section 706(b)) and "to that extent constitutes an express exception to the nondisclosure provisions, and nothing which is a mere recitation of that which [the charging party] himself originated could constitute a disclosure or publication." *H. Kessler & Co.* v. *EEOC*, 468 F.2d 25, 27 (5th Cir. 1972) (panel decision).

suggested procedure of the court below, which procedure involves no disclosure of evidence at all.[7] The Fourth Circuit's procedure permits information to be corroborated or challenged in a manner not inconsistent with legislative intent and with no diminution in the effectiveness of EEOC's procedures.[8]

Since Section 709(e) precludes the disclosure of documents during an investigation—one of EEOC's specified duties under Title VII—it clearly prohibits the wholesale disclosure of the contents of an investigative file to charging parties who may be contemplating litigation. In the context of Senator Humphrey's statement this conclusion is particularly self-evident, because Title VII provides no explicit role for the EEOC relative to a charging party's decision to file or not file a law suit. Since the EEOC has no duty regarding a private litigation decision, Section 709(e) clearly provides no authority for the disclosure of investigative files to charging parties who are contemplating a court suit. The language of Section 709(d) demonstrates, furthermore, that when Congress wanted to authorize disclosure of information under Title VII, it knew how draft legisla-

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[7] In response to EEOC's contention that the prohibition on disclosure would unduly restrict its ability to corroborate evidence during an investigation, the Fourth Circuit stated:

> We think that such corroboration may easily be obtained without violating the statutory restrictions by interrogating those employees on the basis that "it has been said" or "it has been reported" without providing them with letter and verse of the employer's contentions or the specific identity of the representative of the employer advancing the contention. Pet. App. 6a.

[8] Moreover, since there needs to be a reasonable basis for requesting a witness to authenticate a document—that is, that the witness has knowledge of its contents—revealing the contents of the document to an authenticating witness hardly constitutes disclosure.

tion which unequivocally authorized disclosure.[9] In sum, the only tenable conclusion based on the legislative history and statutory language is that "Congress in enacting Section 709(e) had in mind the common prohibition against giving investigatory information to individuals outside the government." *Sears*, 581 F.2d at 947.

B. Disclosure to Charging Parties Constitutes Disclosure to the Public Within the Meaning of Section 709(e) of Title VII

Notwithstanding the unambiguous and broad nondisclosure prohibition in Section 709(e), the Commission's regulations unlawfully create an unwritten exception to Section 709(e) for the benefit of persons or organizations (and their counsel) who have filed charges under Title VII. The central premise of the government's argument is that disclosing information to charging parties and their attorneys is somehow materially different from "making public" that information within the meaning of the statutory prohibition. The purported distinction is illusory. Its argument necessarily rests on the incongruous premise that charging parties and their attorneys are not members of the public, a premise that the circuit courts in both *Sears* (581 F.2d at 946) and *Burlington* (582 F.2d at 1100) recognized as untenable, and which is implicit in the holding of the court below.

Indeed, the EEOC itself treats charging parties as members of the public with regard to its own investigative materials. This policy is most clearly evidenced by the provisions in Section 83.6 of the EEOC Compliance Manual which provide for the "expunction" of intra- and inter-agency memoranda including the investigator's

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[9] Section 709(d) provides in relevant part:

> The Commission *shall furnish* upon request . . . to any State and local [fair employment practice] agency . . . information obtained pursuant to [its recordkeeping requirements]. 42 U.S.C. § 2000e-8(d) (emphasis added).

memorandum and records concerning intra-governmental advisory and deliberative communications. (Jt. App. 39a-41a). Under the Freedom of Information Act (FOIA), the Commission has discretion to exempt such materials from the otherwise mandatory disclosure provisions of the Act. 5 U.S.C. § 552(b) (5) and b(7).[10] But in its brief, the government, argues that "[t]he plain meaning of the term [public], however, encompasses only those persons who have no particularized interest in the dispute", asserting that the legislative development of FOIA is instructive in establishing this faulty proposition.[11] Pet. Br. 19 n.11. The Commission's two positions are inconsistent. It contends in its brief that because charging parties do have a particularized interest in the matter they *are not members of the public* and consequently are not subject to the mandatory nondisclosure prohibition of Section 709(e). On the other hand, even though they do have this particularized interest, they *are members of the public* for purposes of FOIA and its nine permissive exemptions.

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[10] *See Chrysler* v. *Brown*, 99 Sup. Ct. 1705 (1979) (The nine exemptions to public disclosure of identifiable records under FOIA are permissive); *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978) (investigatory files of enforcement agencies are not subject to public disclosure); and *EPA* v. *Mink*, 410 U.S. 73 (1973) (inter- and intra-agency memorandum are not subject to public disclosure.)

[11] In *Charlotte-Mecklenburg Hospital Authority* v. *Perry*, 571 F.2d 198, 202 (4th Cir. 1978)—a case involving an employer pre-suit request for sworn statements taken by the Commission from charging parties during an investigation—the EEOC argued that under the Freedom of Information Act "an interested party, such as the Hospital in this case, has rights under the Act as any other member of the public." This position is in direct conflict with the Commission's position herein and its special disclosure regulations in the Compliance Manual.

Significantly, this inconsistency manifests itself in EEOC's special disclosure regulations with respect to documents and evidence submitted by the parties during an investigation. Section 83.2 of the EEOC Compliance Manual (Pet. App. 33a-34a) creates an exception to disclosure for all persons including charging parties when the Commission is a party to the litigation, and relies on its public disclosure regulations (29 C.F.R. §§ 1610.30-1610.36) to handle requests for information from case files from charging parties and others. Thus, in circumstances where the EEOC has initiated the court suit, the EEOC treats charging parties as members of the public even though "[the] aggrieved person may intervene in the EEOC's enforcement action." *General Telephone Co.* v. *EEOC*, 99 Sup. Ct. 1698, 1704 (1980).

The illogic of the Commission's position is even more evident when one considers the diametrically opposed disclosure policies under Section 709(e) and FOIA and how the Commission has implemented them. Under FOIA, the presumption is in favor of disclosure to the public, while under Section 709(e) the presumption is to preclude such disclosure. Yet EEOC has designed a restrictive disclosure policy as to government memoranda that may be released under FOIA and a liberal disclosure policy for documents provided by persons outside of government during an investigation under a statutory provision whose manifest purpose is to establish an absolute ban on such disclosure to the public including charging parties.

The Commission's interpretation of Title VII is further undercut by its policy of permitting all charging parties with "related" or "similar" charges against the same employer to have access to all of the investigatory files in question. EEOC Compliance Manual § 83.7(c); Pet. Br. 31. Even assuming, *arguendo*, that a charging party is not a member of the public with respect to his own charge, that party is clearly a member of the public with respect to someone else's charge, particularly where the

factual context of the charges may be quite different. Here, for example, only one of the seven charges involves an allegation of race discrimination, but all seven were consolidated for investigation.[12] Under the Commission's disclosure regulations, all seven charging parties would have access to the same investigative files, which may contain documents and information unrelated to their charge.[13] Moreover, even in circumstances where a single charge is involved, disclosure to a charging party would nevertheless be tantamount to making the information public. *Sears*, 581 F.2d at 946-947.

Although the Commission now contends that the informal EEOC nondisclosure agreement (Jt. App. 59) is an enforceable contract, the EEOC admitted before the trial court that it has "no way of preventing charging parties from transmitting information they have to others." Pet. App. 17a-18a.[14] The two courts of appeals

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[12] The fact that the Commission consolidated these charges as a matter of administrative convenience illustrates the difficulty of drawing the line as to the breadth of disclosure and the fallacy of the EEOC's attempt to argue that this case is different from *Sears* and *Burlington Northern* because individual and not systemwide charges are involved. See pp. 19-20, *infra*.

[13] As has been noted and as will be discussed in more detail below (see p. 23-24, *infra*), the Commission's interrogatories were extremely broad and did not distinguish between those interrogatories pertinent to the race versus the sex discrimination charges. Thus, giving access to such files to individual plaintiffs would reveal to them information that would cover subject areas far beyond their individual claims. See also EEOC Compliance Manual § 83.7(c).

[14] *See also H. Kessler & Co.* v. *EEOC*, 53 F.R.D. 330, 340 (D.Ga. 1971), *aff'd*, 468 F.2d (5th Cir. 1972), *rev'd in part*, 472 F.2d 1147 (5th Cir. 1973) (en banc), *cert. denied*, 412 U.S. 939 (1973). Although the government maintains that the EEOC has consistently interpreted Section 709(e), it *has not*

that have considered the question of the enforceability of the nondisclosure agreements have recognized specifically that such informal promises obviously are not enforceable against those receiving the information" and, more generally, that "Title VII provides no effective means to limit distribution of the investigatory material to charging parties alone." *Sears*, 581 F.2d at 946. *Accord, Burlington*, 582 F.2d at 1100 n.6. The concerns of those courts were prompted not by evidence that charging parties might intentionally misuse the materials at issue, but by the fact that continued confidentiality of disclosed information is virtually impossible to ensure. *Cf. Detroit Edison* v. *NLRB*, 99 Sup. Ct. 1123, 1132 (1979) ("[T]he most realistic vice inherent in" disclosure is "the danger of inadvertent leaks"). This being the case, the Commission's policy of turning over investigative materials to charging parties is, at the very least, an indirect form of disclosure to the general public which cannot be reconciled with the statutory ban on making such information public "in any manner whatever."

The Fifth Circuit majority's contrary reading of Section 709(e) and its legislative history in *H. Kessler*

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always applied it consistently because it has not always placed a restriction on disclosure by charging parties or their counsel, including signing a nondisclosure agreement. Before the trial court in *Kessler*, it indicated:

> [T]here is no restriction imposed by the agency on the transmission of information by the charging party's attorney to others, and that there is especially no restriction on the attorney's transmission of the information obtained to the charging party. It appears that the position of the EEOC in this regard is that the question of disclosure of information by the charging party's attorney to whom the EEOC has given access to its investigative files is merely a matter of professional ethics and not an appropriate subject for EEOC regulation or restriction. 53 F.R.D. at 340 (footnote omitted).

& Co. v. *EEOC*, 472 F.2d 1147 (5th Cir. 1973) (en banc), *cert. denied*, 412 U.S. 939 (1973), on which the government relies, was carefully evaluated by the District of Columbia and the Seventh Circuits in *Sears* and *Burlington*, respectively. Although the courts in both cases indicated that it was possible to distinguish *Kessler* by limiting its holding to the specific facts presented, both went further and refuted the premises on which the *Kessler* holding rests. *Sears*, 581 F.2d at 947-48 & n. 9; *Burlington*, 582 F.2d at 1100-1101.[15] Indeed, the Seventh Circuit stated that it was constrained respectfully to disagree with *Kessler* because, *inter alia*, the Fifth Circuit's decision in that case "gave no consideration to the weighty problem of undercutting the Commission's primary role in Title VII enforcement." *Burlington*, 582 F.2d at 1101.

C. The Commission's Pre-suit Disclosure Regulations Have a Deleterious Effect on Voluntary Compliance and Conciliation

Congress has established in Title VII a carefully drawn statute for the prevention of employment discrimination and the minimization of litigation. This Court has noted that primary responsibility for securing compliance with Title VII's mandate rests with the EEOC with cooperation and voluntary compliance through its officers "as

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[15] Both the D.C. Circuit and the Seventh Circuit pointed out that, although a principal basis for the *Kessler* majority's belief that disclosure was necessary concerned the difficulties of obtaining counsel for a private lawsuit, the majority opinion took no note of the 1972 amendments to Title VII, which "substantially alleviated" this purported difficulty. *Burlington*, 582 F.2d at 1101; *Sears*, 581 F.2d at 948 & n.10. Thus, Congress empowered the federal courts in 1972 to appoint counsel for a Title VII plaintiff and to "authorize commencement of the action without payment of fees, costs, or security." 42 U.S.C. § 2000e-5(f)(1). Congress also liberalized the time limits for filing charges alleging discrimination and for filing suit based on such charges. *Id.*

the preferred means for achieving" the purposes of Title VII. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Moreover, the Court has also established that, under the Congressional design, recourse to the private lawsuit is to be the exception rather than the rule, and that it should be used only if the EEOC failed to act with due dilligence and speed. *Occidental Life Insurance Co. of California* v. *EEOC*, 432 U.S. 355, 361, 366 (1977).[16] Consequently, under Title VII, voluntary settlement is the preferred method of resolving employment discrimination claims. Such settlements are favored because they achieve compliance with Title VII "with respect to *all* employees of a given company, rather than merely for those few who might happen to file charges and later bring private actions."[17] *Sears*, 581 F.2d at 946.

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[16] In *Occidental*, this Court stated that "a natural reading of § 706(f)(1) can lead only to the conclusion that it simply provides that a complainant whose charge is not dismissed or promptly settled or litigated by EEOC may himself bring a lawsuit, but that he must wait 180 days before doing so." 432 U.S. at 361. *See also General Telephone Co.*, 100 Sup. Ct. at 1704. Aside from considerations concerning his status as a member of the public, there is no justification for EEOC's disclosure regulations permitting disclosure before 180 days have expired based on some vague notion of "compelling need," especially when the charge has not been dismissed or a right to sue notice has not been issued. See EEOC Compliance Manual § 83.3(a). *See also General Telephone Co.*, 100 Sup. Ct. at 1704 ("The EEOC was to bear the primary burden of litigation . . . .") ; and *EEOC* v. *Cleveland Mills*, 502 F.2d 153, 156 (4th Cir. 1974) ("By whatever means, however, the congressional contemplation was that there should be primary reliance upon the powers of enforcement to be conferred upon the Commission and *not* on private lawsuits, to achieve equal employment opportunity." (Emphasis added, footnote omitted.)

[17] Congress, therefore, has required that the Commission, in conjunction with state and local fair employment practice agencies, "would have an opportunity to settle disputes

The Commission's disclosure policy undermines this design in several critical ways. First, to carry out its statutory role of achieving conciliation agreements and settlement of charges, the EEOC needs to obtain certain information from defendant employers. To the extent the EEOC ignores the strictures of Section 706(b) and 709(e) and opens its files to charging parties, and thereby to the public, employers "in many cases would refuse to comply voluntarily with investigative demands by the EEOC under Section 709(e), thereby forcing the Commission to use subpoena power and suit in district court in place of amicable negotiations." *Sears*, 481 F.2d at 947. Employers would be forced into this posture, as here, so that they "would at least have the opportunity to persuade the court to impose effective restrictions on the scope of distribution—something that is beyond the power of the EEOC to do." *Id. Accord, Burlington*, 582 F.2d at 1100. Thus, there can be no doubt that the expectation of public dissemination of such information inevitably would diminish employers' willingness to comply with broadly worded investigative demands for information as in this case.[18] See Jt. App. 19-21.

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through conference, conciliation, and persuasion before the aggrieved party was permitted to file a law suit." *Gardner-Denver*, 415 U.S. at 44; and *see United Steelworkers of America, AFL-CIO-CLC* v. *Weber*, 99 Sup. Ct. 2721, 2728 (1979).

[18] Similarly, other courts recognizing the need for candid self appraisal under Executive Order 11246, as amended, have restricted the access of Title VII plaintiffs to affirmative action materials where the incentive to engage in self-criticism was adversely affected. *See Stevenson* v. *General Eelctric Co.*, 18 FEP Cases 746 (S.D. Ohio 1976); *Johnson* v. *Southern Railway Co.*, 19 EPD ¶ 9076 (N.D. Ga. 1977); *Dickerson* v. *United States Steel Corp.*, 12 EPD ¶ 11,095 (E.D. Pa. 1976); *Sanday* v. *Carnegie-Mellon University*, 12 FEP Cases 101 (E.D. Pa. 1975); and *Banks* v. *Lockheed-Georgia Co.*, 53 F.R.D. 283 (N.D. Ga. 1971).

Second, the Seventh Circuit found, and the Commission did not disagree, "that the effect, and indeed the purpose, of disclosing investigative material to charging parties as if they were not members of the public would be to encourage the filing of private lawsuits." *Burlington*, 582 F.2d at 1100. *See also Sears*, 581 F.2d at 946. This produces the dual harmful effects of diffusing the energies of both the employer and the EEOC and maximizing the "adversariness" of the process which "will necessarily undercut the preferred enforcement scheme of comprehensive negotiation and settlement." *Burlington*, 582 F.2d at 1100.[19] *Accord*, *Sears*, 581 F.2d at 946. For as the district court in the *Sears* case observed, there is little incentive for the employer to enter into agreement with the EEOC when all private suits against the employer will remain. *Sears, Roebuck & Co.* v. *EEOC*, 435 F.Supp. 751, 757 (D.D.C. 1977), *aff'd in material part*, 581 F.2d 941 (D.C. Cir. 1978).

Significantly, although these concerns have been highlighted to the Commission by two circuits and adopted by the court below, the Commission's brief to the Court offers no satisfactory response to them. Instead, the agency asserts that those courts are in error because they did not consider "the destructive effects that their construction would have on the administrative process as a whole" and, in any event those cases, are inapposite to the matter herein because they concerned the prelitigation disclosure of systemwide files to individual charging parties. (Pet. Br. 32 n.19). Amicus disagrees.

The label which the EEOC puts on its investigation—Rapid Charge Processing System, Early Litigation Identification Program, Commissioner Charge or consolidated investigation—depending on whether narrow or broader-based charges are involved is irrelevant to the disclosure

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[19] *Cf. Charlotte-Mecklenburg*, 571 F.2d at 200 (Disclosure of sworn statements " 'could jeopardize [the EEOC's] conciliation efforts' ").

question here before the Court. Most importantly, there is no basis in Section 709(e) for such a distinction, and the government does not point to one. Furthermore, in the instant matter, as is often the case, the Commission's interrogatories are so broad (see Jt. App. 19-21) that the harmful effects of disclosure on the administrative process are present whether one, seven (as in this case) or systemwide charges are involved. *See, e.g., H. Kessler*, 53 F.R.D. 330; and note 13, *supra*. Indeed, the government does not explain why pre-suit disclosure is any less likely to impede conciliation and foster independent suits in the latter type of proceedings than in the former. Nor is there any logical basis for such an assumption. Given the large EEOC caseload, the aggregate effects of disclosure in numerous individual cases could be at least as harmful to EEOC's conciliation function as in national charge cases such as existed in *Sears*. Charging parties given access to EEOC investigative files prior to conciliation attempts by the agency are just as apt to pursue their own particular interest, rather than "results that will benefit an employer's entire workforce" (*Burlington*, 582 F.2d at 1099), regardless of the size of the respondent or the scope of the proceeding.

Furthermore, the Commission's brief does not adequately respond to the concern expressed by the courts that the EEOC's policy of disclosing its investigative files to charging parties fails to afford workable safeguards against broader dissemination of confidential data obtained from respondents. Rather, the government's answer is, again, simply to deny that the danger perceived by the courts actually exists (Pet. Br. 37-38 n.24). Considering the defects in the Commission's informal non-disclosure procedure,[20] we respectfully submit that the government's optimism about the effectiveness of that procedure is ill-founded.

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[20] *See* pp. 14-15, *supra*, and *Sears*, 581 F.2d at 946-47.

In sum, the Commission's disclosure policy cannot be defended as a necessary or proper part of its investigation and conciliation processes. Instead, it directly undermines and thwarts the statutory scheme by forcing respondents to litigate in order to obtain effective restrictions against dissemination of confidential information and by encouraging private parties to litigate rather than accept comprehensive EEOC-negotiated settlements. Accordingly, Title VII's settlement policy reinforces the language and legislative history of Section 709(e) that Congress intended to exempt disclosure to charging parties from that Section's explicit ban on release of any information in any manner.

II. DISCLOSURE OF INVESTIGATORY MATERIALS TO CHARGING PARTIES UNDERMINES IMPORTANT PROCEDURAL PROTECTIONS UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

The Commission's present disclosure regulations affording charging parties access to the investigative file materials provide them with an unrestricted discovery mechanism not contemplated by Section 709(e).[21] As the Section 709(e) language plainly implies, discovery decisions in the course of "any proceeding [arising] under this title" were intended to be reserved for the court hearing the Title VII action involving such information. To invest charging parties with discovery rights for the purpose of initiating and maintaining lawsuits is, moreover, an unnecessary and unwarranted encroachment on the basic underlying principles of the Federal Rules of

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[21] Indeed, with regard to the affirmative disclosure provisions of the Freedom of Information Act, the EEOC argued in *Charlotte-Mecklenburg* that " 'FOIA is not a substitute for discovery, and a party's asserted need for documents in connection with litigation will not affect, one way or the other, a determination of whether disclosure is warranted under FOIA' ". 571 F.2d at 203.

Civil Procedure (FRCP), which govern the procedures for processing civil lawsuits in federal district courts. FRCP Rule 1, 28 U.S.C. In the context of the language of Section 709(e), the FRCP exist as the only appropriate and sufficient method for the acquisition information by a party in support of civil litigation including an employment discrimination lawsuit. *See* FRCP Rules 26 to 38. As stated by the Fifth Circuit in a Title VII action:

> The discovery provisions of the Federal Rules of Civil Procedure allow the parties to develop fully and crystalize concise factual issues at trial. Properly used, they prevent prejudicial surprises and conserve precious judicial energies. The United States Supreme Court has said that they are to be broadly and liberally construed [citing *Hickman* v. *Taylor*, 329 U.S. 495, 507 (1947) and *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964)].

Burns v. *Thiokol Chemical Corporation*, 483 F.2d 300, 304 (5th Cir. 1973). *See also*, *Mosley* v. *General Motors Corp.*, 10 FEP cases 1442, 1445 (E.D. Mo. 1975). (It being well settled that "the scope of discovery in Title VII cases is very broad . . . the plaintiffs will on discovery have broad access to . . . employment records"). In view of the acknowledged liberality and adequacy of the discovery procedures available to charging parties under the FRCP and in the face of the statutory language, there simply is no justification for the EEOC's disclosure regulations.

Disclosure of investigative files, more importantly, could result in considerable harm to the due process rights of employers. Materials which they submitted to the EEOC during an investigation would in effect be subject to disclosure without the benefit of the procedural safeguards to which they would otherwise have been entitled if the requests were appropriately made in the

course of litigation subject to the FRCP.[22] Under the discovery provisions of FRCP Rule 26(c), employers would be able to seek protective orders limiting the scope of discovery. Because of the kinds of information which the EEOC requested in its interrogatories (see Jt. App. 19-21) and the fact that the Commission's special disclosure regulation provides for the disclosure of employer information reports (EEO-1) and other reports (see EEOC Compliance Manual § 83.7) prescribed by the Commission pursuant to Section 709(c),[23] as will be discussed below, the importance of these procedural protections cannot be minimized.

III. BECAUSE THE COMMISSION'S DISCLOSURE REGULATIONS ARE NOT "AUTHORIZED BY LAW", DISCLOSURE OF THE CONTENTS OF THE INVESTIGATIVE FILE AND EQUAL EMPLOYMENT OPPORTUNITY REPORTS WOULD CONTRAVENE THE TRADE SECRETS ACT

A. The Investigative File and EEO-1 Report Contain Confidential Business Information

As part of its investigation of the charges in this case, the EEOC submitted broad-based interrogatories

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[22] Given the absolute prohibition on public disclosure of investigative materials "in any manner whatever" in Section 709(e), Congress could only have meant that such disclosure could occur pursuant to the discovery processes of the FRCP. *Cf. NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) ("[I]t is reasonable to construe Exemption 5 [of FOIA] to exempt those documents and only those documents normally privileged in the civil discovery context").

[23] Section 709(c) in relevant part authorizes the EEOC to require employers to maintain "such records relevant to the determination of whether unlawful employment practices have been or are being committed . . . and . . . make such reports therefrom, as the Commission shall prescribe . . . as reasonable, necessary, or appropriate for . . . enforcement . . . ." 42 U.S.C. § 2000e-8(c).

(Jt. App. 19-21) to the Respondent which, if answered, would have revealed the staffing patterns, organization and internal workings of the Respondent's stores in Western Pennsylvania. The answers to the interrogatories also would have contained other important workforce information such as wage and salary rates, listings of job categories including lines of progression, promotion rosters, and descriptions of internal training programs.

Pursuant to its authority under Section 709(c), the Commission also requires employers annually to file an EEO-1 report. In completing an EEO-1 report, a company is required to specify the type, identity, location and affiliation of the establishment covered by the report and the major activity conducted at that location, including the specific type of product or service provided by the company. Significantly, the company is also required to explain in the report any major changes in composition or reporting units together with other pertinent information. The EEO-1 lists employees in nine defined job categories which include officials and managers, professionals, technicians, sales workers, office and clerical, craftsmen (skilled), operators (semi-skilled), laborers (unskilled) and service workers, classified by the sex and minority group status of the employees at each corporate facility. After each category is totaled, these summary figures are compared with the summary figures reported for the equivalent category on the previous EEO-1 report. In short, the information contained in the interrogatories and EEO-1 would present extremely detailed data concerning the deployment of the Respondent's or any company's workforce.

Indeed, the data on the EEO-1 alone can reveal highly confidential, commercial information about a company including changes in production, processes, products or

services, production capacity, labor costs, future labor commitment and profit margins.[24] Consequently, the in-

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[24] *See, e.g., Westinghouse Elec. Corp.* v. *Schlesinger,* 329 F. Supp. 1246 (E.D. Va. 1974), and *United States Steel Co.* v. *Schlesinger,* 34 Ad. L. 2d 790 (E.D. Va. 1974), both *aff'd sub nom Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d 1190 (4th Cir. 1976), *cert. denied,* 431 U.S. 924 (1977); *Chrysler Corp.* v. *Schlesinger,* 412 F.Supp. 171 (D.Del. 1977); *vacated and remanded* in 565 F.2d 1172 (3d Cir. 1976), *vacated and remanded* in 99 Sup. Ct. 1705 (1979); *General Dynamics Corp.* v. *Dunlop,* 427 F.Supp. 578 (E.D. Mo. 1976), *rev'd on other grounds,* 572 F.2d 1211 (8th Cir. 1978); *Burroughs Corp.* v. *Brown,* 21 FEP Cases 1455 (E.D. Va. 1980), *appeal pending,* No. 80-1179 (4th Cir.); and Order filed in *Gulf Oil Corp.* v. *Marshall,* Civil Action No. 75-1491 (D.D.C. November 29, 1979), *appeal pending,* No. 80-1127 (D.C. Cir.).

For example, a study of EEO-1 data over a period of years could reveal whether there have been shifts in the make-up of the job categories of a company's workforce. This information, together with a knowledge of any new developments in a particular industry, can enable a competitor to determine whether there has been a change in the company's production processes. Similarly, a company's productive capacity can be determined from this information by comparing a company's output data from different types of operations with the type of labor and equipment used by the company.

Determination of a competitor's labor costs and profit margin can also be readily made from the company's EEO-1. By using the data concerning the size and character of the company's workforce in conjunction with Bureau of Labor Statistics compilations of average labor rates for different job classifications in each locality, it is possible to calculate a company's expenditure on manpower within particular production facilities. Derivatively, such information also reveals the types and amount of expenditures which have been made on labor-saving machinery. By taking all of this information and combining it with the costs of materials, which are fairly standard throughout an industry, a company's cost structure

formation contained in the EEO-1 in conjunction with broadly phrased interrogatories like those used herein would be extremely valuable to competitors.[25] And, as noted above, the EEOC's policy cannot assure that the information given to charging parties will not be more widely disseminated.

The statistical data contained in the documents, as well as much of the narrative information, is clearly confidential, commercial information. The documents are prepared from company files and records, and submitted to the government for the limited purpose of complying with the EEOC's reporting and investigatory requirements under Title VII. Often, written company policies designate such workforce data as sensitive and confidential, restrict the release of such data, and treat such data in a confidential manner. *See Burroughs Corp.* v.

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and profit margin can be determined. In addition, future labor commitments can be determined from the EEO-1 by studying where the on-the-job-trainees have been concentrated over a period of years.

Equipped with the information contained in a company's EEO-1, a competitor could consistently underbid the company, predict the adoption of new products, services or production processes, and reliably plan its market strategies and counterstrategies. A competitor, furthermore, could use the workforce data contained in the EEO-1 to perceive inefficiencies in its own labor force and rearrange its labor force accordingly to gain a market advantage by reducing its prices or labor costs. Such reductions would also enable the competitor to cause further injury by directing its cash flow to other aspects of the competitor's business. New competitors and management consulting firms would also be aided by such information even more directly. Both would be spared the expense of developing a labor make-up for a workforce in a particular industry.

[25] *Id.*

Brown, 21 FEP cases 1455 (E.D. Va. 1980), *appeal pending*, No. 80-1179 (4th Cir.); and *Sears, Roebuck & Co.* v. *GSA*, 553 F.2d 1378 (D.C. Cir. 1977). The information is *not* available to the public through any source or combination of sources. *Id.* Because such information clearly constitutes confidential business information, its disclosure would violate the provisions of the Trade Secrets Act discussed below.

B. Section 709(e) Does Not Authorize Disclosure of Confidential Business Information

The Trade Secrets Act, 18 U.S.C. § 1905, imposes criminal sanctions upon any government employee who "makes known in any manner or to any extent *not authorized by law* any information" submitted to his or her agency, "which information concerns or relates to trade secrets, processes, operations, style of work, . . . confidential statistical data, . . . profits, losses, or expenditures of any person, firm, partnership, corporation or association . . ." (emphasis added). This Court in *Chrysler Corp.* v. *Brown*, 99 Sup. Ct. 1705 (1979), examined the relationship of the Trade Secrets Act to agency regulations permitting or mandating disclosure of equal employment opportunity information including the EEO-1 report under the Freedom of Information Act. The Court held that whether disclosure of information pursuant to agency regulations is "authorized by law" within the meaning of the Trade Secrets Act depends upon whether there is a "nexus between the regulations and some delegation of the requisite legislative authority by Congress." *Chrysler*, 99 Sup. Ct. at 1719. Furthermore, this Court stated:

> The pertinent inquiry is whether under any of the arguable *statutory* [emphasis in original] grants of authority, the OFCCP disclosure regulations relied on by the Government are reasonably within the contemplation of that grant of authority. *We think*

> *it is clear that when it enacted these statutes, Congress was not concerned with public disclosure of trade secrets or confidential business information,* and, unless we were to hold that any federal statute that implies some authority to collect information must grant *legislative* [emphasis in original] authority to disclose that information to the public, it is simply not possible to find in these statutes a delegation of the disclosure authority asserted by the government here. *Id.* at 1720 (emphasis added, footnote omitted).
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> What is important is that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations issued. *Id.* at 1721.

Here, there can be no doubt based on the scant legislative history relating to Section 709(e), that, when Congress enacted Title VII, it did not mean to authorize disclosure of confidential business information. As discussed in detail above (see pp. 6-11, *supra*) the only relevant legislative history to Section 709(e) shows that Congress, at best, was concerned that too broad a ban on disclosure might impede an investigation. Therefore, like the OFCCP regulations which were of concern to this Court in *Chrysler*, the Commission's disclosure regulations are not "authorized by law" as required by 18 U.S.C. § 1905 for lawful disclosure of confidential commercial information.[26]

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[26] In *Chrysler*, the Court concluded that the disclosure regulations had a "substantive" character because they "affect[ed] individual rights and obligations." 99 Sup. Ct. at 1718. Because those regulations were not issued in conformance with the Administrative Procedures Act, the Court

In view of the principles discussed above, it is clear that the statutory and regulatory policy considerations underlying the Trade Secrets Act are designed to protect legitimate and substantial interests in the confidentiality of sensitive business information. Since the EEOC's regulations are not authorized by Section 709(e) or any other provision of Title VII, it is incomprehensible that the Commission considers itself authorized to disclose such information. As noted above (see p. 13, *supra*), Title VII is not a "disclosure statute", and examination of its legislative history reveals nothing to suggest that

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concluded that they were interpretative rules, which precluded their being given the force and effect of law. *Id.* at 1723-1725.

Title VII only grants the Commission authority to issue procedural regulations. 42 U.S.C. § 2000e-12(a). Because of this limitation in its authority, the EEOC's disclosure regulations which affect individual rights and obligations are interpretative rules. *Cf. Joseph* v. *United States Civil Service Commission*, 554 F.2d 1140, 1154 n.26 (D.C. Cir. 1977) ("[W]ithout [legislative] authority, all rules an agency issues are necessarily interpretative . . ."). Such "interpretative regulation[s] . . . cannot be the 'authoriz[ation] by law' required by § 1905." *Chrysler*, 99 Sup. Ct. at 1721.

As to the deference to be accorded the EEOC's interpretation of its organic statute, this Court recently stated in *Mohasco* v. *Silver*, 23 FEP Cases 1, 8 (1980):

> We must also reject any suggestion that the EEOC may adopt regulations that are inconsistent with the statutory mandate. As we have held on prior occasions, "interpretation" cannot supersede the language chosen by Congress [citing *General Electric* v. *Gilbert*, 429 U.S. 125, 140-142 (1976)]. (Footnote omitted).

In view of the Commission's promulgation of disclosure regulations that ignore the clear meaning of Section 709(e) as revealed by its language, purpose and history, and which are inconsistent with the Trade Secrets Act, such regulations have no force and effect. *See also Southeastern Community College* v. *Davis*, 99 Sup. Ct. 2361, 2369 (1979).

"Congress was concerned with public disclosure of trade secrets or confidential business information." *Chrysler*, 99 Sup. Ct. at 1720.[27]

CONCLUSION

For the foregoing reasons, the Equal Employment Advisory Council respectfully submits that decision of the Court of Appeals for the Fourth Circuit banning the disclosure of investigative data to charging parties, their attorneys, and others outside of government prior to commencement of a court suit should be sustained.

Respectfully submitted,

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[27] There is also the danger of unwarranted invasion of the privacy of other employees in the EEOC's disclosure policy. The Commission's subpoena seeks employment applications, payroll records, evaluations, promotion rosters identifying employees by name and sex, disciplinary records, arrest records, personnel action records, including promotions and discharge and identification of rosters of executive trainees by sex and salary. See Jt. App. 19-21. Dissemination of such information to charging parties and subsequently to others, would constitute unwarranted invasions of personal privacy not required for enforcement of Title VII—at least in the absence of a lawsuit. *See* 5 U.S.C. § 552(b)(6), (7)(c) and Privacy Act, 5 U.S.C. § 552(a); and *Department of the Air Force* v. *Rose*, 425 U.S. 352 (1976).